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Supreme Court, U.S.
FILED

04-850 OCT 27 2004

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No.

In The
Supreme Court of the United States

OCTOBER TERM, 2004

YORIE VON KAHL,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Yorie Von Kahl
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QUESTIONS PRESENTED

I. WHETHER PETITIONER CAN BE TRIED OR PUNISHED FOR THE OFFENSE OF SECOND-DEGREE MURDER IN A FEDERAL COURT WHEN THE JURY WAS NEVER INSTRUCTED ON THE PREDICATE JURISDICTIONAL REQUIREMENTS OF 18 U.S.C. § 1111 AND THE ACTS INDISPUTABLY OCCURRED WITHIN THE JURISDICTION OF THE STATE OF NORTH DAKOTA AND NOT WITHIN THE SPECIAL MARITIME AND JURISDICTION OF THE UNITED STATES.

II. WHETHER PETITIONER CAN BE TRIED OR PUNISHED IN A FEDERAL COURT FOR TWO-SEPARATE SUBSTATIVE OFFENSES CHARGED IN THE SAME COUNT, WHEN HE WAS ACQUITTED OF THE INDICTED CHARGE AND THE SECOND DEGREE MURDER CHARGE WAS CLEARLY BEYOND THE SUBJECT-MATTER JURISDICTION OF THE COURT AND THE JURY WAS NEVER EVEN INSTRUCTED ON ANY FEDERAL JURISDICTIONAL PREDICATE FOR A SECOND-DEGREE MURDER CHARGE.

III. WHETHER PETITIONER CAN BE PUNISHED UPON SUCH A DUPLICITOUS COUNT IN AN INDICTMENT WHERE THE JURY'S VERDICT SHOWS AN ACQUITTAL OF FIRST DEGREE MURDER AND OF KILLING THE SPECIFIED OFFICER WHILE ENGAGED IN THE PERFORMANCE OF THEIR OFFICIAL DUTIES AND SUCH JURY RETURNS A SPECIAL VERDICT OF

GUILTY FOR **SECOND DEGREE MURDER ONLY WITHOUT ANY FEDERAL JURISDICTIONAL BASIS**-AN OFFENSE NEITHER TRIABLE NOR PUNISHABLE IN A FEDERAL COURT.

IV. WHETHER THE RECENT DECISION OF THIS COURT IN *BLAKELY* V. *WASHINGTON*, 124 S.Ct. 2531(2004), CONTROLS AND COMPELS REVERSAL OF THE LOWER COURT'S DECISION.

LIST OF PARTIES

The names of all parties appear in the caption of the case. The petitioner is not a corporation.

CITATIONS OF OPINIONS AND ORDERS ENTERED BY LOWER COURTS

United States of America v. Yorie Von Kahl, 2003 U.S. Dist. Lexis 12539

United States of America, v. Yorie Von Kahl, slip op. U.S.N.D. April 26, 2004

United States of America v. Yorie Von Kahl, No. 03-3009 (8th Circuit July 30, 2004), order denying rehearing and petition for rehearing en banc.

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BASIS OF JURISDICTION

This petition seeks review of a decision of the United States Court of Appeals for the Eighth Circuit which denied Mr. Kahl's request for a rehearing en banc of a Panel's affirmance of the United States District Court for the District of North Dakota's refusal to correct the illegal sentence imposed upon him. This petition is authorized and timely under 28 U.S.C. §2101 and Rule 13 (3) of the rules of the United States Supreme Court.

STATEMENT OF THE CASE AND PERTINENT FACT

This case presents the extremely important issue of whether Petitioner can be convicted and punished of the crime second-degree murder for the alleged killing of a United States employee in violation of 18 U.S.C.§ 1114, when Petitioner was acquitted on that charge, and the jury was never instructed on the federal jurisdictional prerequisite under 18 U.S.C. § 1111, and, as a matter of law, the facts indisputably establish that there was no federal jurisdiction over the alleged crime of second-degree murder.

Petitioner was indicted by a federal grand jury in the District of North Dakota on March 11, 1983, in an eleven count indictment. Count 1 charged Petitioner with the first degree murder of Kenneth Muir, a United States marshal engaged in the performance of his official duties, in violation of 18 U.S.C. § 1111 and 18 U.S.C. § 1114. Count 2 charged Petitioner with the first degree murder of Robert S. Cheshire, Jr., a deputy United States Marshal who was engaged in the performance of his official duties in violation of 18 U.S.C. § 1111 and 18

U.S.C. § 1114. Both counts also cited 18 U.S.C. § 2, but no elements of § 2 were charged in the language of the indictment. (*See* App. at 32-33.)[1]

The United States unequivocally argued, both in opening and closing arguments, that it was trying "two murders, premeditated calculated murders." (App. at 6-7.) The trial judge instructed the jury on the elements for both first degree murder as defined by 18 U.S.C. § 1111(a) and killing a federal officer while engaged in the performance of his official duties as defined by 18 U.S.C. § 1114. (App. at 61) The trial judge then instructed upon the elements of first degree murder alone without reference to the offense of killing federal officers. (App. at 62-63.) The trial judge also instructed upon second degree murder as a lesser-included offense of first degree murder, though neither of the statutes upon which Petitioner was indicted provided any jurisdictional basis for the crime of second degree murder based on the facts of this case. (App. at 69.)

The jury returned general verdicts of "not guilty of the offense of first degree murder of Kenneth B. Muir as charged in the indictment" on Count One and "not guilty of the offense of first degree murder of Robert S. Cheshire, Jr. as charged in the indictment." (App. at 73-74.) The jury returned special "guilty" verdicts for second degree murder on counts 1 and 2, without the qualifying phrase "as charged in the indictment" which was omitted by the jury verdict forms for the crime of **second degree murder only**. (*Id.*) The Presentence Investigation Report (PSI) confirmed that the verdicts were for "second degree murder." (App. at 11-12.)

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[1] Only Counts I and II are relevant to this writ for certiorari.

At sentencing, however, AUSA Crooks referred to the convictions as "these murders, cold blooded calculated murders," an obvious misrepresentation but a statement reflective of how the Court treated the case. (App. at 87.) The District Court sentenced Petitioner to life imprisonment on Count One for second degree murder and for killing a federal officer in violation of 18 U.S.C. § 1111 and § 1114 and again for second degree murder and for killing a federal officer in violation of 18 U.S.C. § 1111, 1114 and 2 "as charged in the indictment," (App. at 87A.)[2]

On March 18, 2003, Petitioner filed a Rule 35(a) motion to correct the "illegal sentences" on 'Counts One and Two asserting that he was acquitted on those counts for both first degree murder and for killing federal officers engaged in the performance of their official duties and **only** found guilty for second degree murder, an offense which on the face of the record is not a federal offense and for which the District Court lacked jurisdiction to issue any sentence.[3] In ruling on the motion, the

[2] The court imposed concurrent and additional sentences for other offenses, which the court imposed consecutive to the sentences for Counts One and Two for a total sentence of life plus 10 years plus 5 years. (App. at 87A-87B.)

[3] Rule 35 is merely the codification of the common law rule retaining inherent jurisdiction in a sentencing court to correct illegal sentences imposed and to correct sentences imposed in an illegal manner. *See United States v. Rico*, 902 F.2d 1065, 1067 (2nd Cir. 1990). Where the judgment is "void," it is not "final." *DeBenque v. United States*, 85 F.2d 202, 205 (D.C. Cir. 1936). An "illegal sentence" is among other things a sentence "that the judgment of conviction did not authorize," *Morgan v. United States*, 346 US 502, 506, 74 S. Ct. 247, 98 L. Ed. 248 (1954), or when it is "not authorized by law." *United States v. Peltier*, 312 F.3d 938, 942 (8th Cir. 2002). The courts have not ruled that this case was not properly brought under rule 35A.

District Court acknowledged that the "jury found Yorie guilty of two counts of second degree murder," (App. at 128), and that the "court imposed two concurrent life terms for the second degree murders." (App. at 129.) The District Court erroneously held that "[t]he relevant statute, 18 U.S.C. § 1111, allows a court to impose a life sentence on an individual found guilty of second degree murder," (App. at 130), ignoring in *toto* the constitutional and statutory limits of that statute. In doing so, the Court erroneously reasoned that 18 U.S.C. § 1114, which, the court erroneously twice noted, "incorporates the definitions found in 18 U.S.C. § 1111" and "only incorporates the definition and punishment of 18 U.S.C. § 1111," *citing* to "*United States v. Young*, 248 F.3d 260, 274-74 (4th Cir. 2001)" for the wholly irrelevant proposition that "when a federal statute refers to the definition portion of 18 U.S.C. § 1111, it is only referring to subsection (a)." (App. at 130.) The court also stated that "subsection (b) [18 U.S.C. § 1111] is not incorporated by 18 U.S.C. § 1114." (App. at 130-31.)

In direct contradiction to the jury's acquittals of the Section 1114 offenses, the District Court decided that "Kenneth Muir and Robert Cheshire were federal officers who were killed while performing their official duties, therefore the federal-court had jurisdiction to try the case." (App. at 131.) Finally, the District Court asserted that it could not comprehend the difference between the acquittals in the jury verdict form and the guilty verdicts. (App. at 131.) While the District Court admitted it recognized the clear language of the acquittal rendered for the offenses of Counts One and Two "as charged in the indictment" and that the guilty verdicts returned for second degree murder omitted the all-inclusive language "as charged in the indictment," thereby omitting key ele-

ments, the court again correctly noted the "verdict form identifies both men by name and states the charge" — i.e., second degree murder only. (App. 131.)

On appeal, the United States Court of Appeals perfunctorily affirmed the District Court's judgment, ruling, "[c]ontrary to Kahl's contention, federal jurisdiction supporting the jury verdicts was established, and his conviction and sentences for second-degree murder were authorized by 18 U.S.C. § 1111 (maximum life sentence) and § 1114 (conferring federal jurisdiction to punish those who kill United States employees engaged in performance of official duties)." It did so even though the jury was never instructed on 18 U.S.C. §1111, the federal jurisdictional prerequisite, and, even more significantly, there were no facts to support federal jurisdiction over a second-degree murder charge. Thus, in essentially rubber stamping the lower court, the Eighth Circuit completely ignored Petitioner's arguments that the Court lacked jurisdiction because there did not exist a crime of second-degree murder under the referenced statutes, as applied to the indisputable facts of this case. The Eighth Circuit thereafter denied Petitioner's Motion for a rehearing en banc on July 30, 2004. Petitioner then timely filed this writ of certiorari.

ARGUMENT

I. The Lower Courts Erroneously Ruled That 18 U.S.C. § 1111 Conferred Federal Jurisdiction To Support The Jury's Verdict Of Second-Degree Murder.

Petitioner was acquitted of the crime of first degree murder in violation of 18 U.S.C. §§ 1111 and 1114.

With respect to the crime of second-degree murder, the Trial Court merely instructed the jury of the "official federal status" of the officers protected under §1114 without any instruction as to the jurisdictional elements essential to federal jurisdiction under § 1111 which is expressly incorporated by § 1114. Based on the Trial Court's erroneous instruction, Petitioner was convicted on two counts of second-degree murder for killing two United States Marshals in the performance of their duties.

But, standing alone, there is no second-degree murder offense for killing federal officers engaged in the performance of their official duties. 18 U.S.C. § 1114 establishes only the crime of murder of a United States employee in the performance of their duties. It does not, by its terms, provide for the crime of second degree murder. Moreover, at the time of the act in 1983, § 1114 incorporated only § 1111(b), jurisdictional and punishment provisions, not the crime of second degree murder. *See* 18 U.S.C. § 1114 (1983). *See also United States v. Brunson*, 549 F.2d 348, 351 (5th Cir. 1977) (§ 1114 prior to amendments "incorporates only the penalty" sections of § 1111 and 1112).

But, even if it had incorporated second-degree murder under § 1111(a), it would expressly require that the government to establish the jurisdictional elements of 18 U.S.C. § 1111 to confer jurisdiction to convict and sentence the Petitioner for the crime of second-degree murder. Yet, the Trial Court **never** instructed the jury as to the jurisdictional elements of 18 U.S.C. § 1111, which would have been necessary to confer federal jurisdiction to sustain a second-degree conviction and sentence. (*See* App. at 69.) The Trial Court obviously did not because there were no facts to support federal jurisdiction.

The lower courts recognized that 18 U.S.C. § 1111 was the "relevant statute." (App., p. 130.)[4] Specifically, the Trial Court stated, "18 U.S.C. § 1111 allows a court to impose a life sentence on an individual found guilty of second degree murder." While that may be true, § 1111 expressly applies only "[w]ithin the special maritime and territorial jurisdiction of the United States." The jurisdictional reach and applicability of this statute has always been and remains special and exclusive, limited by constitutional grants of power and by express legislative terms. *Lewis v. United States*, 523 US 155, 166, 171 (1998) (18 U.S.C. § 1111 is "applicable only on federal enclaves"); *United States v. Bin Laden*, 92 F.Supp.2d 189, 204-215 (S.D.N.Y. 2000) (detailing history and jurisdictional application of § 1111 and dismissing counts because the acts did not occur within "the special maritime and territorial jurisdiction of the United States" as required by the Constitution, 18 U.S.C. §§ 7 and 1111(b)); *United States v. Gatlin*, 216 F.3d 207, 216-219 (2nd Cir. 2000) (detailing history of federal criminal jurisdiction since the 1790 Act and particularly the constitutional and statutory limits in respect to federal murder jurisdiction).

Without exception, the constitution and the declarations of the Supreme Court have held that "murder" is not and never has been punishable by Congress and the federal courts unless it has been committed "outside the jurisdiction of the state," and the murder offense prescribed by 18 U.S.C. § 1111 is and remains "applicable only on federal enclaves." *Lewis, supra; United States v. Parker*, 622 F. 2d 298, 302-305 (8th Cir. 1980) (place requirements of § 1111(b) are mandatory to permit feder-

[4] Indeed, as a matter of subject matter jurisdiction, it was essential.

al jurisdiction over offense); *United States v. Leight*, 818 F.2d 1297, 1305 (7th Cir. 1987) (exclusive place requirements of statute must be proven beyond reasonable doubt or court loses jurisdiction over offense).

There is no dispute that the acts in this case occurred approximately one mile north of Medina, North Dakota on a state-owned highway and within the jurisdiction of North Dakota. The government offered no evidence that the acts occurred "within the special maritime and territorial jurisdiction of the United States," as required by § 1111(b) and defined in § 7. The government made no attempt to prove this jurisdictional element because, as a matter of undisputed fact, **it could not**. Thus, the lower courts' erred by merging 18 U.S.C. §§ 1111 and 1114 to create the crime of second-degree murder in this case, where there was not only no instruction to the jury of the necessary jurisdictional element that the acts occur within the special maritimes or territorial jurisdiction of the United States, there was absolutely no evidence to support this prerequisite to federal jurisdiction. Put simply, the lower courts outright excised the plain language of § 1111(b) from the statute to sustain its jurisdiction and impermissibly uphold the "illegal" second-degree conviction and sentencing of Petitioner.

The District Court spent nearly a full page discussing that the same act "may constitute an offense against the United States and an offense against a state." As true as this may be, it has no application to a purely second degree murder offense committed within the jurisdiction of a state and clearly not "within the special maritime and territorial jurisdiction of the United States," as jurisdictionally required by the "relevant statute," 18 U.S.C. § 1111. (App., pp. 130-131.) The Trial

Court continued its reasoning that "[t]he unlawful killing of a federal officer is an offense against the United States, and 18 U.S.C. § 1114 gives federal court's jurisdiction to try those cases." (App., p. 130.) This reasoning is completely erroneous because the federal jurisdiction conferred by § 1111 depends on the location of the crime, not against whom the crime was committed.

Then, contrary to the clear statutory language, the District Court determined that "[f]or the definitions of murder, 18 U.S.C. § 1114 incorporates the definitions found in 18 U.S.C. § 1111. 18 U.S.C. § 1114(1)." (App., p. 130.) Here, the Trial Court made two errors. First, the court relied upon an amended § 1114 that did not exist at the time of the instant offenses and, second, the § 1114 statute in existence in February of 1983 incorporated only the punishment section of § 1111 and did not employ the term "murder" or even refer to the definitional section of § 1111(a). *See* 18 U.S.C. § 1114 (1983). *See also United States v. Brunson*, 549 F.2d 348, 351 (5th Cir. 1977) (§ 1114 prior to amendments "incorporates only the penalty" sections of § 1111 and 1112).

In sum, because there was no second-degree murder offense of killing a federal officer while performing his official duties at the time of the acts, the Trial Court erroneously convicted and sentenced Petitioner for second-degree murder of a United States Marshal engaged in their duties, when that crime did not exist in 1983 and without any jurisdictional basis that such a crime in any event must occur "within the special maritimes or the territorial jurisdiction of the United States." The Trial Court's comment in his Order on Petitioner's Rule 35(a) proceeding that "Muir and Cheshire were both officers or employees of the United States engaged in official duties

when they were killed [t]herefore, the court had jurisdiction over this case, 18 U.S.C. § 1114, so the judgment is not void," (App. 131) is purely wrong and an erroneous creation of law by the judge. The Eighth Circuit's perfunctory affirmance is also clearly erroneous. Thus, the sentences on Counts One and Two are, therefore, absolutely illegal, coram non judice, absolute nullities and void ab initio and must be vacated.

II. The Recent Blakely Decision Requires Reversal of The Lower Court's Decision.

Blakely v. Washington, 124 S.Ct. 2531(2004), has affirmed the principles of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and has made it clear that a sentence imposed upon facts not found by the jury or admitted by the defendant is unauthorized and illegal. 124 S.Ct. at 2538-39. It is a question of "power" and "authority." 124 S.Ct. at 2538-43 (it "is no mere procedural formality, but a fundamental reservation of power"). *Blakely* held that a defendant who had never been convicted by a jury (beyond a reasonable doubt) of specific facts that permit a statutortly provided sentence has an "entitlement" to the sentence prescribed by the verdict alone. 124 S.Ct. at 2543.

The guilty verdicts on Counts 1 and 2 in this case do not reveal *any* offense either within the terms of 18 U.S.C. § 1111(b) (federal murder offense) or 18 U.S.C. § 1114 (killing of federal officer in performance of official duties offense). No offense punishable or triable in a federal court exists upon the face of the verdicts, as a matter of law in 1983, or as the Trial Court erroneously instructed the jury on second degree murder.

Petitioner is "*entitled*," 124 S.Ct. at 2543 (emphasis by Court), to the result of the jury's findings, which in this case is vacation and dismissal of the illegal life sentences. The "Sixth Amendment was not written for the benefit of those who choose to forgo its protection. It guarantees the *right* to jury trial." 124 S.Ct. at 2542 (emphasis by Court). The Sixth Amendment "limits judicial power... to the extent that the claimed judicial power infringes on the province of the jury." 124 S.Ct. at 2539-41.

Petitioner did not choose to forgo this constitutional protection and he simply seeks judicial enforcement of this "right" and his "entitlement" to expungement of the illegal life sentences. In respect to Counts 1 and 2, the infringement in this case by the sentencing judge, overriding the jury's acquittals of the § 1114 offenses and adding them to the non-federal second degree murder verdicts (creating a composite offense never enacted by Congress) for the purpose of imposing life sentences, is total. *Cf. United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (trial judge is constitutionally "barred" from "overriding" jury verdict contrary to the interests of the defendant).

"When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment... and the judge exceeds his proper authority.'" 124 S.Ct. at 2537 (citation omitted) ("the judge's authority to sentence derives wholly from the jury's verdict".) Similarly, verdicts of second degree murder without allegation or proof that the offense occurred "within the special maritime and territorial jurisdiction of the United States" - *i.e.* "federal enclave" jurisdiction — is a non-federal offense triable and punishable only by the state.

Lewis v. United States, 523 U.S. 155, 166, 171 (1988); *United States v. Bevans*, 16 U.S. (3 Wheat.) 336, 387-389 (1818) (same). Any sentence upon the guilty verdicts "alone," *Blakely*, 124 S. Ct. at 2537, is constitutionally and statutorily *prohibited* as well. *Fed. R. Crim. Pro.* 32(b) ("other reason" discharge is mandatory.) *Cf. 18 U.S.C. § 3231* (district court's jurisdiction statutorily limited to "offenses against the laws of the United States" and does not include state offenses"; *see* also Article III, Sec. 2, Cl. 2 (judicial power limited to "cases" and "controversies" "arising under" the "Constitution, Laws of the United States, and Treaties" — does not include state offenses of murder); id., Clause 3 ("The Trial of all Crimes.., shall be by Jury").

Sentences which are unauthorized, "infringe on the province of the jury," and are a pure usurpation by "a lone employee" of the Government, *id.*, and clearly illegal. *Blakely*, 124 S.Ct. at 2538-43. *Blakely* completely supports Petitioner's arguments. Thus, his life sentences on Counts 1 and 2 are illegal because (1) the jury acquitted him of the offenses as charged in Counts 1 and 2 concluding that no federal officers performing official duties were killed and (2) the jury returned special verdicts of second degree murder of two named human beings - non-federal offenses. It is not denied that no offense "within the special maritime and territorial jurisdiction of the United States," a jurisdictional and essential element of murder pursuant to 18 U.S.C. § 1111(b), was ever alleged or proven and, thus, no such offense exists upon the trial record of this case.

CONCLUSION

Because the face of the record discloses that the Trial Court convicted and sentenced Petitioner for offenses not within the scope of the "relevant statute," 18 U.S.C § 1111, and, therefore, not within the sentencing court's subject-matter jurisdiction or its Article III Jurisdiction — there being, no violation of any "laws of the United States," 18 U.S.C. § 3231 — and since any remaining sentences (aggregating a total of 15 years) being finally exhausted no later than February 12, 1998, this Court should address this appeal promptly, as any delay whatsoever will be highly prejudicial to petitioner and the interests of justice.

Respectfully submitted

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October 27, 2004

ADDENDUM

2003 U.S. Dist. LEXIS 12539, *
United States of America, Plaintiff, -vs- Yorie Von Kahl, Defendant.

Civil File No. A3-96-55

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, SOUTHEASTERN DIVISION

2003 U.S. Dist. LEXIS 12539 July 14, 2003, Decided

SUBSEQUENT HISTORY: Affirmed by *United States v. Kahl*, 2004 U.S. App. LEXIS 8141 (8th Cir. N.D., Apr. 26, 2004)

PRIOR HISTORY: *Von Kahl v. United States*, 242 F.3d 783. 2001 U.S. App. LEXIS 3538 (8th Cir. N.D., 2001).

DISPOSITION: [*1] Defendant's motion to correct illegal sentence denied. Defendant's motion for extension of time denied as moot.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant filed a motion to correct an allegedly illegal sentence pursuant to former Fed. R. Crim. P. 35 that were applicable to defendant's conviction. Defendant was convicted after a jury trial of two counts of second-degree murder and other crimes for his role in a shoot-out in which two officers of the United States Marshal's Office were killed.

OVERVIEW: Defendant contended that the two life sentences imposed for defendant's conviction for second degree murder were illegal because he claimed that the court did not have jurisdiction to try him for murder when the murders did not happen on the high seas or on property owned by the United States. The court held that former Fed. R. Crim. P. 35 permitted corrections to an illegal sentence at any time for offenses committed before November 1, 1987, when the sentence was not authorized by the judgment of conviction. In this case, the court had discretion to impose the term of incarceration based upon the sentencing provisions of *18 U.S.C.S. § 1111*. Defendant's jurisdictional challenges did not relate to the legality of the sentence. Moreover the court found that the merits of defendant's argument were groundless. Jurisdiction was conferred under *18 U.S.C.S. § 1111(a)*, as incorporated into *18 U.S.C.S. § 1114*, and the provisions of *18 U.S.C.S. § 1111(b)*, limiting jurisdiction to maritime or federal property, were not part of that jurisdictional assessment.

OUTCOME: The court denied defendant's motion to correct an allegedly illegal sentence.

CORE TERMS: sentence, second degree murder, murder, marshal's, territorial jurisdiction, offenses committed, verdict form, incarceration, maritime, killed, jurisdiction to try, first degree murder, reply brief, duties, lacked jurisdiction' present motion, property owned, high seas, correction, arrest

LexisNexis(R) Headnotes • *Hide Headnotes*

Former Fed. R. Crim. P. 35(a) stated that a court may correct an illegal sentence at any time. This rule applies

to all sentences imposed for offenses committed before November 1, 1987.

The purpose of Fed. R. Crim. P. 35 is to permit correction at any time of an illegal sentence. An illegal sentence available for correction under this rule is a sentence not authorized by the judgment of conviction. Situations where a sentence is illegal include when the punishment is in excess of that prescribed by statute and when multiple terms of incarceration are imposed for the same offense. If the court had the discretion to impose the challenged term of incarceration, it is not an illegal sentence.

18 U.S.C.S. § 1111 allows a court to impose a life sentence on an individual found gulity of second degree murder. Where defendant's sentence was authorized by statute, it is not illegal.

It is well-settled that the same act may constitute an offense against the United States and an offense against a state. Congress has the power to pass laws that provide for the punishment of all crimes and offenses against the United States. The unlawful killing of a federal officer is an offense against the United States, and *18 U.S.C.S. § 1114* gives federal courts jurisdiction to try those cases. For the definitions of murder, *18 U.S.C.S. § 1114* incorporates the definitions found in *18 U.S.C.S. § 1111*.

The "special maritime" and "territorial jurisdiction" language of 18 U.S.C.S. § 1111 is not incorporated by 18 U.S.C.S. § 1114(1) because 18 U.S.C.S. § 1114(1) only incorporates the definition and punishment portions of 18 U.S.C.S. § 1111. When a federal statute refers to the definition portion of 18 U.S.C.S. § 1111, it is only referring to 18 U.S.C.S. § 1111(a). The "special maritime" and

"territorial jurisdiction" language of 18 U.S.C.S. § 1111(b) is another independent jurisdiction clause. Since that portion of 18 U.S.C.S. § 1111(b) is not incorporated by 18 U.S.C.S. § 1114, the government does not have to prove that the crime took place within the special maritime or territorial jurisdiction of the United States.

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For Yorie Von Kahl: Joe Alfred Izen, Jr, Izen & Associates PC, Bellaire, TX, USA.

For USA: John T. Schneider, US Attorney's Office, Fargo, ND USA.

JUDGES: Ralph R. Erickson, District Judge, United States District Court.

OPINION BY: Ralph R. Erickson

OPINION: ORDER DENYING MOTION FOR CORRECTION OF SENTENCE PURSUANT TO RULE 35 (A)

Before the Court is a motion by Yorie Von Kahl to Correct an Illegal Sentence pursuant to *Rule 35(a) of the Federal Rules of Criminal Procedure* (doc. # 70). Plaintiff has filed a brief in opposition (doc. # 74). Defendant filed a reply brief (doc. # 81).

BACKGROUND

The events leading up to the present motion began in 1977. In that year, Yorie Kahl's father, Gordon, was con-

victed on two counts of failing to file income tax returns. After being released from prison, Gordon violated the terms-of his probation and then refused to appear in court on the matter. A warrant for his arrest was issued.

On Sunday, February 13, 1983, the United States Marshal's [*2] Office located Gordon, who was with a group of people that included Yorie and Scott Faul. *United States v. Faul, 748 F.2d 1204, 1208 (8th Cir. 1984)*. The marshals attempted to arrest Gordon. *Id.* at 1209. A shootout started and two marshals were killed. *United States v. Udey, 748 F.2d 1231, 1234 (8th Cir. 1984)*. On May 28, 1983, a jury found Yorie guilty of two counts of second degree murder, assaulting United States Marshals and other law enforcement officers, conspiracy to assault, and harboring and concealing a fugitive. *Faul, 748 F.2d at 1207*. The court imposed two concurrent life terms for the second degree murders. (Id.)

ANALYSIS

Former *Federal Rule of Criminal Procedure 35*(a) stated that a court may "correct an illegal sentence at any time." *United States v. Landrum, 93 F.3d 122, 125 (4th Cir. 1996)*. This rule applies to all sentences imposed for offenses committed before November 1, 1987. *(Id.)* A jury convicted Yorie of offenses committed in 1983, so the Court has jurisdiction to decide the present motion. See id. (stating that a court may correct an illegal sentence at any time [*3] for offenses committed before November 1, 1987).

The purpose of *Federal Rule of Criminal Procedure 35* is to "permit correction at any time of an illegal sentence." *Hill v. United States, 368 U.S. 424, 430, 7 L. Ed. 2d 417,*

82 S. Ct. 468 (1962). An illegal sentence available for correction under this rule is a sentence not authorized by the judgment of conviction. *United States v. Peltier, 312 F.3d 938, 942 (8th Cir. 2002)* (quoting *United States v. Morgan, 346 U.S. 502, 506, 98 L. Ed. 248, 74 S. Ct. 247 (1954)*). Situations where a sentence is illegal include when the punishment is in excess of that prescribed by statute and when multiple terms of incarceration are imposed for the same offense. *Hill, 368 U.S. at 430*. If the court had the discretion to impose the challenged term of incarceration, it is not an illegal sentence. *Peltier, 312 F.3d at 942*.

Yorie argues that his sentence is illegal because the court did not have jurisdiction to try him for murder. He argues that the federal government only has criminal jurisdiction on the high seas or on property owned by the United States. Since the murders [*4] in this case did not happen on the high seas or on property owned by the United States, Yorie argues that the federal court lacked jurisdiction.

These arguments do not relate to the legality of the sentence imposed because Yorie is not arguing that his sentence is in excess of that authorized by statute, or that he received multiple terms of incarceration for the same offense, or that it was legally or constitutionally invalid in any other respect. *Peltier, 312 F.3d at 942*. The relevant statute, *18 U.S.C. § 1111*, allows a court to impose a life sentence on an individual found guilty of second degree murder. Since Kahl's sentence was authorized by statute, it is not illegal.

Even if Kahl's motion were properly before the Court, his arguments fail on their merits. It is wellsettled that the

same act may constitute an offense against the United States and an offense against a state. *Crossley v. California, 168 U.S. 640, 641, 42 L. Ed. 610, 18 S. Ct. 242 (1898)*. Congress has the power to pass laws that "provide for the punishment of all crimes and offenses against the United States." *Logan v. United States. 144 U.S. 263, 283, 36 L. Ed. 429, 12 S. Ct. 617 (1892)*. **[*5]** The unlawful killing of a federal officer is an offense against the United States, and *18 U.S.C. § 1114* gives federal courts jurisdiction to try those cases. *United States v. Harrelson, 754 F.2d 1153, 1173 (5th Cir. 1985)*. For the definitions of murder, *18 U.S.C. § 1114* incorporates the definitions found in *18 U.S.C. § 1111.18 U.S.C. § 1114(1)*.

The definitions portion of 18 U.S.C. § 1111 is found at subsection (a), which contains a mens rea element and the different degrees of murder. The "special maritime" and "territorial jurisdiction" language of *18 U.S.C. § 1111* is not incorporated by *18 U.S.C. § 1114(1)* because *18 U.S.C. § 1114 (1)* only incorporates the definition and punishment portions of *18 U.S.C. § 1111. See United States v. Young, 248 F.3d 260, 274-74 (4th Cir. 2001)* (stating that when a federal statute refers to the definition portion of *18 U.S.C. § 1111*, it is only referring to subsection (a)). The **[*6]** "special maritime" and "territorial jurisdiction" language of subsection (b) of *18 U.S.C. § 1111* is another independent jurisdiction clause. *Id. at 275*. Since that portion of subsection (b) is not incorporated by 18 U.S.C. § 1114, the government did not have to prove that the crime took place within the special maritime or territorial jurisdiction of the United States.

Kenneth Muir and Robert Cheshire were federal officers who were killed while performing their official duties, therefore the federal court had jurisdiction to try the

case. *18 U.S.C. § 1114*; see also *Logan, 144 U.S. at 283* (stating that Congress has the authority to pass laws that punish crimes against the United States). Yorie's argument that the court lacked jurisdiction is frivolous, *United States v. Adams, 581 F.2d 193, 200 (9th Cir. 1978)*, and without merit, *United States v. Deering, 179 F.3d 592, 597 (8th Cir. 1999); Barrett v. United States, 82 F.2d 528, 534 (7th Cir. 1936).*

Yorie also appears to find significant a difference in the wording between the first [*7] degree murder charge and the second degree murder charge on the verdict form. The first degree murder charge includes the words "as charged in the indictment" while the second degree murder charge does not include that language. The Court fails to see the significance of this difference. The language on the verdict form specifically states that the jury found Yorie guilty of the "offense of second degree murder of Kenneth B. Muir" and the "offense of second degree murder of Robert S. Cheshire, Jr." The verdict form identifies both men by name and states the charge. Muir and Cheshire were both officers or employees of the United States engaged in official duties when they were killed. Therefore, the court had jurisdiction over this case, *18 U.S.C. § 1114*, so the judgment is not void.

DECISION

Based on the foregoing, Defendant Yorie Von Kahl's Motion to Correct an Illegal Sentence pursuant to Rule 35(a) of the Federal Rules of Criminal Procedure is **DENIED**. Defendant's Motion for extension of time to file the reply brief and for an order compelling the United States to provide legal opinions and records (doc. # 80) is moot.

IT IS SO ORDERED [*8].

Dated this 14 day of July, 2003.

Ralph R. Erickson, District Judge

United States District Court

United States Court of Appeals
For the Eighth Circuit

No. 03 - 3009

UNITED STATES OF AMERICA,
Appellee,

v.

YORIE VON KAHL,
Appellant.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

July 30, 2004

Order Entered at the Direction of the Court:
ILLEGIBLE /s
Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
For the Eighth Circuit

No. 03-3009

United States of America,
Appellee,

v.

Yorie Von Kahl,
Appellant.

Appeal from the United States
District Court for the
District of North Dakota
[UNPUBLISHED]

Submitted: April 1, 2004

Filed: April 26, 2004

Before BYE, McMILLIAN, and RILEY, Circuit Judges.

PER CURIAM.

Yorie Von Kahl (Kahl) appeals from the final judgment entered in the United States District Court[1] for the District of North Dakota denying his motion to correct an illegal sentence. Kahl, who was sentenced to life impris-

onment in 1983 for his role in a shootout that resulted in the deaths of two United States Marshals, brought this motion pursuant to a former, pre-1987 version of Fed. R. Crim. P. 35(a) (court may correct illegal sentence at any time). As the district court determined, Kahl's arguments in support of the motion did not relate to the legality of his sentence and, in any event, were meritless. *See Hill v. United States*, 368 U.S. 424, 430 (1962) (narrow function of Rule 35 is to permit correction of illegal sentence; sentence is not illegal if it did not exceed that prescribed by relevant statutes, multiple prison terms were not imposed for same offense, and terms of sentence itself were not legally or constitutionally invalid); *United States v. Woods*, 973 F.2d 677, 678 (8th Cir. 1992) (sentence within statutory maximum is not illegal sentence). Contrary to Kahl's contention, federal jurisdiction supporting the Jury verdicts was established, and his convictions and sentences for second-degree murder were authorized by 18 U.S.C. § 1111 (maximum sentence of life) and § 1114 (conferring federal jurisdiction to punish those who kill United States employees engaged in performance of official duties). Accordingly, we affirm. *See* 8th Cir. R. 47B.

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[1] The Honorable Ralph R. Erickson, United States District Judge for the District of North Dakota.